STATE OF MICHIGAN

IN THE SUPREME COURT

(ON APPEAL FROM THE COURT OF APPEALS)

PATRICIA MYRA CORLEY,

Plaintiff-Appellee,

v

DETROIT BOARD OF EDUCATION, JOSEPH SMITH, and BARBARA FINCH, Jointly and Severally,

Defendants-Appellants.
_____/

S.C. No. 119773
C.A. No. 218528
L.C. No. 97-704241-CZ

119773
Supl

SUPPLEMENTAL BRIEF IN SUPPORT OF DEFENDANTS-APPELLANTS' APPLICATION FOR LEAVE TO APPEAL

PROOF OF SERVICE

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PLAINTIFF WAS ENGAGED IN A ROMANTIC RELATIONSHIP WITH HER WORKPLACE SUPERVISOR, WHICH RELATIONSHIP CONCLUDED WHEN THE SUPERVISOR BECAME ROMANTICALLY INVOLVED WITH AND MARRIED ANOTHER EMPLOYEE. MICHIGAN'S CIVIL RIGHTS ACT RECOGNIZES THAT IN EMPLOYMENT FREEDOM FROM DISCRIMINATION BECAUSE OF SEX IS A CIVIL RIGHT, BUT THE ACT DOES NOT BAR ALL CONDUCT THAT IS IN ANY WAY REMOTELY RELATED TO SEX. DID THE COURT OF APPEALS ERR IN FINDING THAT PLAINTIFF COULD PURSUE CLAIMS FOR SEXUAL HARASSMENT BASED ON ALLEGED CONDUCT AND COMMUNICATION FOLLOWING THE FAILED ROMANTIC RELATIONSHIP?

Defendants-Appellants Detroit Board of Education, Joseph Smith, and Barbara Finch say "YES".

Plaintiiff-Appellee says "NO".

STATEMENT OF MATERIAL PROCEEDINGS AND FACTS

On July 25, 2001, the Detroit Board of Education, Joseph Smith, and Barbara Finch, hereinafter collectively referred to as defendants, filed their application for leave to appeal. There, defendants sought peremptory relief from or leave to appeal the court of appeals' July 5, 2001 order denying defendants' motion for rehearing. That order left standing the court of appeals' published opinion of May 15, 2001, which, in principal part, allowed Patricia Myra Corley to proceed with her suit for sexual harassment against defendants.

In seeking leave to appeal, defendants noted the court of appeals' observation to the effect that plaintiff's appeal presented an issue of first impression, to wit: "Whether an alleged adverse employment action against an employee on the basis of her former intimate relationship with her supervisor presents a cognizable claim of sex discrimination under the CRA [Civil Rights Act]". Defendants also referenced Patricia Myra Corley's own characterization of her suit. More particularly, at page 4 of her court of appeals brief, plaintiff had candidly acknowledged that hers was not the "typical" sexual discrimination/harassment claim brought pursuant to Michigan's Civil Rights Act. To plaintiff's way of thinking, rather than "being premised upon a broad pattern of discrimination on the basis of gender or the harassment of an employee who refuses to accede to the unwanted sexual demands of another", her suit was "rooted in the aftermath of a consensual romantic intimate relationship with her supervisor.

Those being the attributes of plaintiff's cause of action, defendants invoked the rule that the Civil Rights Act is not so broad as to bar all conduct that is in any way tangentially or remotely related to sex. They took the position that, when it ruled that plaintiff established sufficient facts to survive a motion for summary disposition under both a *quid pro quo* sexual harassment theory as well as a hostile work environment sexual harassment theory, the court of appeals disregarded the clear and unambiguous language of the Civil Rights Act, ignored well-settled principles of law, and overstepped its assigned judicial bounds by effectively re-writing the provisions of Michigan's Civil Rights Act in a manner which conflicts with the governing legislative scheme and with case law authority construing the same. Consequently, defendants sought this Court's involvement. They asked for peremptory relief or, in the alternative, full consideration by the Court. Plaintiff did not file a brief opposing defendants' requested relief.

On November 19, 2002, the Court issued an order directing that defendants' application for leave to appeal be held in abeyance pending the decision in *Haynie v State of Michigan,* (Docket No. 120426) [468 Mich 302 (2003)]. Thereafter, on January 16, 2004, following the *Haynie* ruling, the Court directed the clerk to schedule oral arguments on whether to grant defendants' application for leave to appeal or to take other action permitted by MCR 7.302(G)(1). The parties are to include among the issues to be addressed the question of whether plaintiff offered sufficient evidence that she was subjected to "conduct or communication of a sexual nature" within the meaning of MCL

37.2103(i) so as to avoid summary disposition under MCR 2.116(C)(10). Defendants file this supplemental brief in accord with the Court's directive that supplemental briefs may be filed within 28-days of January 16, 2004.

Defendants initially seek a preemptory reversal of the complained-of portions of the court of appeals' May 15, 2001 published opinion. As will be made clear in the following sections of this brief, plaintiff failed to come forth with specific facts showing the existence of a genuine issue for trial concerning whether the conduct complained of by her was verbal or physical conduct or communication of a sexual nature. The controlling language of Michigan's Civil Rights Act, MCL 37.2103(c)(i), counsels in favor of defendants' requested relief. Case law annotations likewise support the rule that sexual harassment means sexual harassment. Sexual harassment does not mean harassment based upon one's gender. A sexual harassment suit is not the avenue of relief for one disappointed by the conduct of another with whom one shared a consensual intimate relationship. Conduct emanating from a failed lover's relationship, does not, *per se,* constitute conduct or communication of a sexual nature. In the alternative, defendants state that pursuant to MCR 7.302(B)(3) and (5), the Court properly grants them leave to appeal the court of appeals' May 15, 2001 Opinion.

ARGUMENT

PLAINTIFF LACKS A COGNIZABLE CLAIM FOR SEX HARASSMENT.

A. MCRA and Sexual Harassment

Claims for sexual harassment are based on various provisions of Michigan's Civil Rights Act, *Radtke v Everett,* 442 Mich 368, 382-383 (1993). More particularly, MCL 37.2202(1)(a) directs that an employer shall not:

> [f] fail or refuse to hire or recruit, discharge, or otherwise discriminate against an individual with respect to employment, compensation, or a term, condition, or privilege of employment, because of religion, race, color, national origin, age, sex, height, weight or marital status.

In turn, MCL 37.2101(1) provides that the opportunity to obtain employment without discrimination because of sex as prohibited by the Civil Rights Act is recognized and declared to be a civil right. Finally, MCL 37.2103(i) articulates the specifics of a claim for sexual harassment:

> Discrimination because of sex includes sexual harassment. Sexual harassment means unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct or communication of a sexual nature under the following conditions:
>
> > (i) Submission to the conduct or communication is made a term or condition either explicitly or implicitly to obtain employment, public accommodation or public services, education, or housing.
> >
> > (ii) Submission to or rejection of the conduct or communication by an individual is used as a factor in decisions affecting the individual's employment, public accommodations or public services, education or housing.

(iii) The conduct or communication has the purpose or effect of substantially interfering with an individual's employment, public accommodations or public services, education or housing, or creating an intimidating, hostile, or offensive employment, public accommodations, public services, educational, or housing environment. (emphasis added).

Sexual harassment can manifest itself in two different forms, to wit: harassment involving the exchange of concrete employment benefits for sexual favors, i.e., *quid pro quo* discrimination, or harassment that creates an offensive or hostile work environment, *Rabidue v Osceola Refining Company,* 805 F2d 611, 618 (6th Cir, 1986).

In order to establish a claim of *quid pro quo* harassment, an employee must, by a preponderance of the evidence, demonstrate:

(1) That she was subject to any of the types of unwelcome sexual conduct or communication described in the statute; and

(2) That her employer or the employer's agent used her submission to or rejection of the proscribed conduct as a factor in a decision affecting her employment, *Chambers v Trettco, Inc,* 463 Mich 297, 310 (2000).

In keeping with those same provisions of the Civil Rights Act, the Court has fashioned five necessary elements for a *prima facie* case of sexual harassment based upon a hostile work environment, *Radtke, supra,* at pp. 382-383. Those are as follows:

(1) The employee belonged to a protected group;

(2) The employee was subjected to communications or conduct on the basis of sex;

(3) The employee was subjected to unwelcome sexual conduct or communication;

(4) The unwelcome sexual conduct or communication was intended to or did in fact substantially interfere with the employee's employment or created an intimidating, hostile, or offense work environment; and

(5) *Respondeat superior.*

B. <u>Conduct or Communication of a Sexual Nature</u>

Obvious from a recitation of the elements comprising *prima facie* claims for sexual harassment, be they a claim for *quid pro quo* sexual harassment or for hostile work environment sexual harassment, is that both types involve conduct or communication of a sexual nature. Without the involvement of conduct or communication of a sexual nature, a plaintiff lacks a *prima facie* sexual harassment claim of any sort. In sum, in order to establish a claim of *quid pro quo* harassment under MCL 37.2103(i)(ii), a plaintiff must initially prove that he/she was subject to any of the types of unwelcome sexual conduct or communication described in the statute. So, too, a plaintiff hoping to establish a hostile environment sexual harassment claim under MCL 37.2103(i)(iii) must show that he/she was subjected to unwelcome sexual conduct or communication. As otherwise stated, a plaintiff who is unable to prove that he/she was subjected to unwelcome sexual conduct or communication cannot establish a *prima facie* case for either *quid pro quo* harassment

or for hostile work environment harassment, *Chambers v Trettco, Inc, supra,* at pp 310-311.

C. Application of *Haynie v. State of Michigan,* 468 Mich 302 (2003)

The Court's recent decision in *Haynie v State of Michigan,* 468 Mich 302 (2003) speaks to this critical component of a *prima facie* sexual harassment case. It instructs that a plaintiff who pleads gender-based harassment that is not at all sexual in nature is unable to establish a claim of sexual harassment under the Civil Rights Act. That is because the Civil Rights Act clearly and unambiguously prohibits sexual harassment, which is defined in the Act as "unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct or communication of a sexual nature…". Consistently then, conduct or communication that is gender-based, but that is not sexual in nature, does not constitute sexual harassment.

In *Haynie*, two Michigan State Police capitol security officers, Virginia Rich and Canute Findsen, shot and killed each other while on duty. After the shooting, the plaintiff, the personal representative of the estate of Virginia Rich, brought suit under the Civil Rights Act. She claimed that Findsen had sexually harassed Rich by making hostile and offensive comments about Rich's gender, thus creating a hostile work environment. Conceding that the alleged offensive conduct was not sexual in nature, plaintiff insisted that the conduct was gender-based and that allegations of gender-based harassment were sufficient to establish a claim for sexual harassment. The Court disagreed.

It emphasized that, in order to recover for sexual harassment, a plaintiff must establish not only that she was discriminated against because of sex but that she was subjected to unwelcome sexual conduct or communication. That third element, derived from MCL 37.2103(i), provides that sexual harassment means unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct or communication of a sexual nature. Thus, even assuming that harassment based on pregnancy may constitute discrimination based on pregnancy, and thus, sex discrimination, harassment based on pregnancy, but not at all sexual in nature, does not amount to sexual harassment. That fact proved fatal to the *Haynie* plaintiff's suit:

> Pregnancy discrimination is sex discrimination, but it is not sexual harassment. In order to prove pregnancy discrimination, one must show the employer discriminated against an employee on the basis of a pregnancy. However, in order for one to prove sexual harassment, one must show that there was either "unwelcome sexual advances, requests for sexual favors, [or] other verbal or physical conduct or communication of a sexual nature..." Accordingly, pregnancy discrimination and sexual harassment consist of substantially different elements, and thus a person asserting a claim of sexual harassment must prove something considerably different from a person asserting a claim of pregnancy discrimination.

468 Mich 302, 311.

As for the *Haynie* plaintiff's urging that article 2 of the Civil Rights Act defined "sex" to include pregnancy at MCL 37.2201(d), and thus that harassment based on pregnancy fell within the meaning of sexual harassment, the Court responded that said definition of "sex" only applies to article 2 of the Civil Rights Act. Thus, although "sex"

includes pregnancy for purposes of article 2 of the Civil Rights Act, "sex" does not include pregnancy for purposes of article 1 of the Act dealing with sexual harassment:

> To recapitulate, the CRA, MCL 37.2202(1)(a), prohibits employment discrimination because of sex. The Civil Rights Act, MCL 37.2201(d), defines "sex" to include pregnancy. Therefore, by concluding that harassment based on pregnancy is sexual harassment, the *Koester* court also concluded that harassment based on gender is sexual harassment, even though such harassment is not at all of a sexual nature. However, the CRA, MCL 37.2103(i), defines "sexual harassment" as "unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct or communication of a sexual nature..." It is clear from this definition of sexual harassment that only conduct or communication that is sexual in nature can constitute sexual harassment, and thus conduct or communication that is gender-based but that is not sexual in nature cannot constitute sexual harassment. Accordingly, we overrule *Koester* to the extent that it concludes that harassment based on gender that is not at all sexual in nature constitutes sexual harassment under the CRA. (emphasis in original)

468 Mich 302, 312-313. The unremarkable, but proper, result of *Haynie* is that "conduct or communication that is gender-based, but is not sexual in nature, does not constitute sexual harassment as that term is clearly defined in the Civil Rights Act," 468 Mich at 313.

D. Neither Plaintiff's Filings nor Proofs Establish A Genuine Issue of Material Fact as to the Existence of Conduct or Communication of a Sexual Nature

With the Civil Rights Act specifically defining sexual harassment as "conduct or communication of a sexual nature," in order to advance a viable *quid pro quo* case of sexual harassment or a hostile work environment sexual harassment case, a plaintiff is

bound to show that the conduct complained of was sexual in nature. That being the situation, an examination of Patricia Corley's various filings is in order. As in *Haynie*, plaintiff's complaint is devoid of any allegations of conduct or communication of a sexual nature. At ¶16 of the complaint, plaintiff complains that defendant Smith confronted her with thinly veiled threats, advising that he was aware that she needed her part-time job, and expressly and/or impliedly warned her that her job would be lost unless she promised to refrain from doing anything which would adversely impact Smith's continuing relationship with Defendant Finch. Continuing with this same theme, plaintiff also alleges that Smith repeated the aforementioned threats throughout the 1995-1996 school year. At ¶17 of the complaint, plaintiff avers that Defendant Finch exhibited hostility towards her and often made known her displeasure with plaintiff's regular presence at the school. ¶18 of the complaint sets forth the allegation that, following Smith and Finch's marriage in the Spring of 1996, Smith frequently reiterated his warnings and then became more detached and distant toward plaintiff, exhibiting unprovoked irritation with her and avoiding all professionally-related interaction with her. At ¶19 of the complaint, plaintiff refers to Smith's "change of disposition" towards her. Finally, at ¶21 of the complaint, plaintiff asserts that her discharge resulted exclusively from Smith's discomfort about plaintiff's presence at the school due solely to Smith's fear that plaintiff's presence would adversely affect Smith's personal relationship with his wife.

As for the disposition testimony concerning plaintiff's interaction with Mr. Smith, plaintiff merely stated that Mr. Smith telephoned her on September 25, 1995, to inform her that another counselor would be taking her position. (Defendants' Motion for Summary Disposition, Exhibit 3, Dep of Patricia Myra Corley, pp.26-29). Plaintiff also described the time when Mr. Smith instructed her to assume a new work station:

> Well, initially Mr. Smith came to me and said I don't want you to sit at Sharon's desk anymore, I want you to sit at the first desk, the one that's nearest the door. And I asked him why and he said Sharon King had requested that I not sit at her desk anymore. I asked him why and he said that was just her request. I asked him if anything had been left in disarray on her desk or if anything was missing, he said no, that was just her request . . .

(Defendant's Motion for Summary Disposition, Exhibit 3, Dep of Patricia Myra Corley, p 76). She also recalled that Mr. Smith threatened her with the loss of her job, saying that he knew that she was a single parent and that he knew that she needed the job. (Defendants' Motion for Summary Disposition, Exhibit 3, Dep of Patricia Myra Corley, p 59). Notably absent from this testimony is any indicia of any foul language, any vulgar behavior, or any conduct or communication of a sexual nature.

The same must be said of plaintiff's deposition testimony as to her encounters with Barbara Finch. At pages 11-13 of her deposition, plaintiff alluded to catty remarks on registration day in September 1995 (Defendants' Motion for Summary Disposition Exhibit 3, Dep of Patricia Myra Corley, pp 11-15) and of other non-specific catty remarks

by Barbara Finch. (Defendants' Motion for Summary Disposition, Exhibit 3, Dep of Patricia Myra Corley, pp 72-73). Plaintiff also felt that it was Dr. Finch who had "engineered" the situation involving the change of plaintiff's work station (Defendants' Motion for Summary Disposition, Exhibit 3; Dep of Patricia Myra Corley, p 73). Even if true, this behavior in no way even begins to approach conduct or communication of a sexual nature.

Plaintiff's practice of not pleading conduct or communication of a sexual nature continued. In opposing, defendants' motion for summary disposition, plaintiff urged that her treatment and discharge were "inextricably intertwined" with her gender. In fact, she proposed that her gender was the sole basis for the alleged discriminatory conduct aimed at her. So, too, plaintiff maintained that she was treated differently on the basis of her gender and her romantic history and that, had she not been a woman, she never would have had the type of relationship she had with Smith which the individual defendants found to be so threatening. At other points in her response in opposition to defendants' summary disposition motion, plaintiff reiterated that her gender was the sole basis for the alleged discriminatory conduct aimed at her. She contended that her gender and her history with Smith were the motivating factors for defendants' conduct. She concluded by stating that Smith subjected her to repeated threats about the loss of her job knowing how important her job was to her as a single parent, demeaned her, and participated with Finch in humiliating her by assigning her to an isolated work station.

In her brief on appeal in the court of appeals, plaintiff repeated her position that her continued presence in the workplace after the failed relationship with Smith was what motivated defendants during the remainder of plaintiff's employment. Her arguments to the Court of Appeals underscored the fact that plaintiff did not ground her suit on conduct or communication of a sexual nature:

> Apparently uncomfortable with the plaintiff with whom he had had a long-term and close relationship, and the defendant Finch, with whom he was beginning a similar relationship, both working in the same building as himself, defendant Smith repeatedly threatened the plaintiff. He warned that if she were to say or do anything which might interfere with his new relationship with Finch, he would fire her. Beginning in 1995 and continuing into the fall 1995-1996 school year, Smith repeatedly threatened to fire plaintiff if she created any "mess" about the termination of their relationship or the commencement of his new relationship.
>
> In addition to defendant Smith's direct threats with regard to her continued employment, defendant Smith and Finch both engaged in a campaign designed to taunt, embarrass and humiliate the plaintiff.
>
> Defendant Finch, though not a member of the night school staff, and despite the fact that her office was not in the immediate vicinity of the plaintiff's desk, frequently made a point of visiting the area in which the plaintiff worked to make remarks about her relationship with defendant Smith. Although ostensibly addressed to others, it was readily apparent that Finch's frequent comments were intended to make the plaintiff uncomfortable.
>
> Additionally, Finch played a major role in requiring that the plaintiff change her workstation. After years of using the same desk during the night school, without objections from the secretary assigned to the desk during the day, defendants Finch and Smith combined in requiring plaintiff to sit in an "assigned" area while the other counselors remained free to sit wherever they wanted. Plaintiff's "assigned" workstation was isolated

> from all other night school staff, and its location and limited surrounding space was demeaning and demoralizing to the plaintiff.

Plaintiff also implicitly acknowledged that the behavior of which she complained was not conduct or communication of a sexual nature:

> Admittedly, the plaintiff's particular factual scenario which gave rise to the suit is not the typical sexual discrimination/harassment claim brought pursuant to the Elliot-Larsen Civil Rights Act. Rather than being premised upon a broad pattern of discrimination on the basis of gender or the harassment of an employee who refuses to accede to the unwanted sexual demands of another, the instant action is rooted in the aftermath of a consensual romantic/sexual relationship between the plaintiff and her supervisor. Notwithstanding the peculiar, atypical basis for this suit, plaintiff submits that it is nevertheless actionable under the Act...

(Plaintiff's brief on appeal, p. 4.)

Later, at page 7 of her brief, plaintiff conceded that her case did not involve an overall pattern of discrimination against her. She recognized that any dispute was premised upon the fact that she had previously been involved in a romantic relationship with Smith. She urged that her gender was the sole basis for the alleged discriminatory conduct aimed at her. (Plaintiff's brief on appeal, p. 8.) According to plaintiff, it was her gender, coupled with her history with Smith, that were the sole factors motivating defendants' alleged conduct (*Id.*).

E. Gender Discrimination is Not Sexual Harassment

As made abundantly clear by the Court in its *Haynie* decision, gender discrimination is not sexual harassment. Sexual harassment is marked by conduct or

communication of a sexual nature. Plaintiff's own filings compel the conclusion that the alleged harassment of which plaintiff complained was not conduct or communication of a sexual nature. Sexual harassment means sexual harassment, *Haynie, supra,* at p. 318. What is before the Court is not an actionable sexual harassment claim. As it did in *Haynie,* the Court must pay heed to the Michigan Legislature's express definition of sexual harassment as involving conduct or communication of a sexual nature. In light of that definition, the Court properly concludes that plaintiff lacks a viable sexual harassment claim of any sort. Had Michigan's Legislature intended the Civil Rights Act to protect against sexual harassment based upon romantic jealousy or gender, it could have expressly stated as much within the Act. The Legislature did not so provide for claims based on failed amorous relationships. See, *Barrett v Kirtland Community College*, 245 Mich App 306, 322-323 (2001):

> Interpreting the CRA's prohibition of discrimination based on sex to prohibit conduct based on romantic jealousy turns the CRA on its head. The CRA was enacted to prevent discrimination because of classifications specifically enumerated by the Legislature and to eliminate the effects of offensive or demeaning stereotypes, prejudices, and biases. *Radtke, supra,* at 379; *DeFlaviis, supra,* at 440. It is beyond reason to conclude that plaintiff's status as the romantic competition to the woman Vajda sought to date placed this plaintiff within the class of individuals the Legislature sought to protect when it prohibited discrimination based on sex under the CRA...
>
> ***
>
> Plaintiff proceeded to a trial on a theory of discrimination based on romantic jealousy. Plaintiff did not claim and the evidence did not establish that Plaintiff was required to submit to sexually-based harassment

> as a condition of employment. Nor did the evidence presented at trial support a theory of gender-based discrimination. Plaintiff established, at most, that Vajda's alleged adverse treatment of plaintiff was based on plaintiff's relationship with Goshorn, not plaintiff's gender. Vajda may have had a romantic purpose in initially pursuing Goshorn in May, as the trial court surmised, having intended to eliminate plaintiff so that he could pursue Goshorn's affections. However, Vajda's alleged harassment was not conduct prescribed by the CRA because it was not gender-based. Indeed, if Vajda's motive was to win the affection of Goshorn, it would not matter if the person Vajda perceived to be standing in his way was male or female...

Thus, what is before the Court is a statutory scheme that defines sexual harassment to include specific behavior, i.e., conduct or communication of a sexual nature. It is the sexual nature of the conduct or communication that makes it actionable. Simply stated, the complained-of conduct must be overtly sexual. It is not sufficient that a plaintiff plead gender-based discrimination. Instead an aggrieved party must allege and prove overtly sexual conduct like sexual advances or sexual favors. In the present case, there are no allegations that defendants ever made sexually suggestive remarks or that they made any sexual advances. None of the alleged statements or conduct relates to any type of sexual matters on the order of sexual advances or requests for sexual favors.

Analogously, in *Succar v Dade County School Board,* 229 F3d 1343 (11th Cir, 2000), the court took up the issue of whether harassment inflicted upon an employee by a coworker with whom that employee had a prior consensual sexual relationship was actionable under Title VII, 42 USC §2000 e, under a hostile work environment theory of recovery. In that case, the defendant school board hired the plaintiff Joseph Succar as a

full-time teacher. Succar, who was married, commenced a consensual sexual relationship with Ms. Lorenz, a fellow teacher. Near the end of the parties' one-year relationship, Lorenz began making threatening overtures towards Succar's wife and son. Thereafter, the relationship between Succar and Lorenz ended. The court then described the course of the parties' relationship after the breakup:

> Lorenz's behavior toward Succar following the termination of their relationship was at best acrimonious. She verbally and physically harassed Succar and sought to embarrass him in front of colleagues and students. Succar insists that he did nothing to encourage this behavior and took steps to quell it, including avoiding Lorenz whenever possible and reporting the incidents to the school's principal. Succar maintains that the principal took insufficient steps to remedy the situation, thereby allowing the harassment to continue unabated.
>
> After exhausting his administrative remedies, Succar filed a complaint with the district court pursuant to Title VII in which he alleged "hostile work environment" sexual harassment. The school board subsequently filed a motion for summary judgment which the district court granted.

229 F3d 1343-1344. The appeals court agreed with the well-reasoned order of the district court. It found that Succar failed to establish all of the elements of a *prima facie* case. In reaching that conclusion, the court cited authority standing for the proposition that Title VII prohibits discrimination; it is not a shield against harsh treatment at the workplace, *McCollum v Bolger,* 794 F2d 602, 610 (11th Cir, 1986). The *Succar* court pronounced that personal animosity is not the equivalent of sex discrimination and that a plaintiff may not turn a personal feud into a sex discrimination case. The court declined to so quickly disregard that precept of sexual harassment law simply because the plaintiff and the

alleged harassing party may have had a past sexual relationship. Lorenz's harassment of Succar was motivated not by the latter's male gender but rather by Lorenz's contempt for Succar following her failed relationship.

Patricia Myra Corley does not claim to have been damaged as a result of her refusal to submit to sexual advances, to give in to requests for sexual favors, or because she was the subject of verbal or physical communication or conduct of a sexual nature. Rather, she asserts that defendants are liable because of their responses to plaintiff's former intimate place in Smith's life. In particular, plaintiff bases her suit upon defendants' alleged contempt for her following a failed romantic relationship. Taking plaintiff's allegations as true, the Court must conclude that they do not state a claim for sexual harassment under Michigan's Civil Rights Act. Plaintiff occupies the same position as do other men and women following a failed intimate relationship.

The court in *DeCintio v Westchester County Medical Center,* 807 F2d 304 (SD NY, 1986) held that voluntary, romantic relationships cannot form the basis of a sex discrimination suit under Title VII. That is because sex discrimination does not equate with personal animosity. A person cannot, by accusation, turn a personal feud into a sex discrimination case, *Freeman v Continental Technical Services, Inc,* 710 F Supp 328, 331 (ND Ga 1988).

Plaintiff was the subject of defendants' alleged conduct, if at all, because she experienced a failed intimate relationship with Joseph Smith. Yet, plaintiff never came

forth with any allegations or proofs that defendants made any sexually suggestive remarks or any sexual advances toward her. The complained-of conduct simply was not sexually based. None of the statements or conduct relates to any type of sexual matter on the order of sexual advances or requests for sexual favors. That means that defendants were entitled to judgment as a matter of law. In *Schemansky v California Pizza Kitchen, Inc,* 122 F Supp 2d 761 (ED Mich, 2000), the court found that the alleged conduct of the plaintiff waitress' male coworkers such as failing to prepare the waitress' personal food orders and pretending to spit in her food did not amount to sexual harassment under the Civil Rights Act. So, too, the court in *Hickman v W-S Equipment Company, Inc,* 176 Mich App 17 (1989) found that the act of discharging one female employee in order to give the employee's job to the girlfriend of the employer's president, while unfair, did not constitute a violation of the Civil Rights Act and did not constitute sexual harassment as defined in the Act.

In *Quinto v Cross and Peters Company,* 451 Mich 358 (1996), the Court held that the plaintiff failed to sufficiently support a *prima facie* case of hostile work environment with documentary evidence sufficient to withstand the defendant's motion for summary disposition. The *Quinto* court's review centered upon whether the employee was subjected to unwelcome conduct or communication involving her protected status and whether the unwelcome conduct was intended to or did in fact substantially interfere with the employee's employment or create an intimidating, hostile or offense work

environment. To survive summary disposition, the plaintiff had to present documentary evidence to the trial court that a genuine issue existed regarding whether a reasonable person would find that, in the totality of circumstances, the defendant's comments to the plaintiff were sufficiently severe or pervasive to create a hostile work environment. All that was before the Court was the deposition testimony and the affidavit of the plaintiff. The latter disclosed no specific instances of ethnic, sexist, or ageist remarks hostile to a protected class from which an inference of a hostile work environment could be drawn.

CONCLUSION

Based on *Quinto*, the court of appeals erred when it concluded that plaintiff possessed a *prima facie* case for sexual harassment. Plaintiff's allegations and proofs that defendants targeted her for persistent and hostile communications and other adverse actions because they disliked her continued presence in the workplace as Smith's former paramour were insufficient. They are not support for the notion that defendants engaged in conduct or communication "of a sexual nature". The mere fact that the alleged conduct followed the failed romantic relationship between plaintiff and Mr. Smith is not enough. The existence of a prior sexual/romantic relationship between a plaintiff and his/her supervisor is not sufficient to thereafter render any and all conduct by the supervisor as conduct or communication of a sexual nature. With the Civil Rights Act defining sexual harassment to include sexual advances, requests for sexual favors, and other verbal or physical conduct or communication of a sexual nature, the court of

appeals was bound to rule that plaintiff lacked a *prima facie* claim for sexual harassment. To hold that any and all conduct following the cessation of a consensual intimate relationship between two individuals, *per se,* represents conduct or communication of a sexual nature is untenable. Such a result would throw the workplace into a state of upheaval. It would color all subsequent conduct between failed paramours as the potential stuff of a civil rights claim. Erroneously so, in sparing plaintiff's case from summary disposition, the court of appeals failed to appreciate that plaintiff's suit was based on nothing more than personal animosity resulting from a failed consensual intimate relationship. This is not conduct or communication of a sexual nature. And the Civil Rights Act is not a guarantee that co-employees will act in a civil manner toward one another or that workplace conditions will be perfect.

RELIEF

WHEREFORE, Defendants-Appellants Detroit Board of Education, Joseph Smith, and Barbara Finch respectfully request that the Court peremptorily reverse the complained-of portions of the Court of Appeals' May 15, 2001 published opinion and, failing that, grant defendants' application for leave to appeal.

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_____/

PROOF OF SERVICE

Christine D. Oldani, hereby certifies that she is an attorney with the firm of Plunkett & Cooney, P.C., and that on the 11th day of February, 2004, she caused to be served a copy of the Supplemental Brief in Support of Application for Leave to Appeal and Certificate of Service upon the following:

Ernest L. Jarrett, Esq.
2515 Cadillac Tower
Detroit, MI 48226

by enclosing same in a pre-addressed, pre-stamped envelope and depositing same in the United States Mail.

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February 11, 2004

Clerk of the Court
Michigan Supreme Court
925 West Ottawa
Lansing, MI 48915

Re: Corley v Detroit Board of Education, et al
S.C. No. 119773
C.A. No. 218528
L.C. No. 97-704241-CZ
Our File: 07911.90104

Dear Clerk:

Enclosed please find for filing an original and eight copies of Supplemental Brief in Support of Defendants-Appellants' Application for Leave to Appeal and Proof of Service regarding this matter. Please time stamp and return the extra copy for our file.

Please feel free to contact me should you have any questions or concerns. Thank you for your attention to this important matter.

Very truly yours,

Christine D. Oldani

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CDO:rtc
Encl.
c: Ernest Jarrett, Esq.

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